Supreme Court, U. S.
FILED
APR 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1487

DANIEL J. EVANS, WILLIAM K. BECK,
and GEORGE W. MACFADDEN,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES M. RUSS
I. PAUL MANDELKERN
Law Offices of James M. Russ
441 First Federal Building
109 East Church Street
Orlando, Florida 32801
Telephone: (305) 849-6050
Attorneys for Petitioners

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504/822-1611

INDEX


Page

Opinions Below ..... 2

Jurisdiction ..... 2

Questions Presented ..... 3

Statutory Provisions Involved ..... 3

Statement of the Case ..... 3

REASONS FOR GRANTING THE WRIT

I. THE ABSENCE OF JUDICIAL PARTICIPATION IN THE JURY SELECTION PROCESS AND THE FAILURE OF THE DEPUTY CLERKS OF THE DISTRICT COURT TO COMPLY WITH THE MANDATORY REQUIREMENTS OF THE JURY SELECTION AND SERVICE ACT OF 1968 AND THE IMPLEMENTING PLAN OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA CONSTITUTE A "SUBSTANTIAL FAILURE TO COMPLY" WITH THE ACT WARRANTING DISMISSAL OF THE INDICTMENT PURSUANT TO 28 U.S.C. §1867(a) ..... 7

II. 28 U.S.C. §1867(a) AND ITS LEGISLATIVE HISTORY DO NOT REQUIRE THAT AN ACTUAL SHOWING OF PREJUDICE BE SHOWN BEFORE RELIEF WILL BE GRANTED ..... 12

INDEX (Continued)

Page

CONCLUSION ..... 14

CERTIFICATE OF SERVICE ..... 15

CERTIFICATE OF ATTORNEY ..... 15

APPENDIX

1. Opinion of the United States Court of Appeals for the Fifth Circuit in *United States of America* v. *Daniel J. Evans, et al.*, No. 75-1541, dated February 2, 1976 ..... 1a

2. Order of the United States Court of Appeals for the Fifth Circuit in *United States of America* v. *Daniel J. Evans, et al.*, No. 75-1541, dated March 15, 1976, denying petition for rehearing ..... 16a

3. Judgment of the United States Court of Appeals for the Fifth Circuit in *United States of America* v. *Daniel J. Evans, et al.*, No. 75-1541, dated February 2, 1976 ..... 18a

4. Order of the United States District Court for the Middle District of Florida in *United States of America* v. *William K. Beck, et al.*, No. 74-196-Orl-Cr-R, dated December 24, 1974, denying motion to dismiss indictment ..... 19a

5. United States Code, Title 28, Sections 1861-1869 ..... 22a

6. Pertinent sections of the Plan of the United States District Court for the Middle District of Florida for the Random Selection of Grand and Petit Jurors, as amended May 31, 1973 ..... 42a



TABLE OF AUTHORITIES

Page

CASES:

*Abbott* v. *Mines*, 411 F.2d 353 (6 Cir. 1969) ..... 11

*Ballard* v. *United States*, 329 U.S. 187 (1946) ..... 11

*Glasser* v. *United States*, 315 U.S. 60 (1942) ..... 11

*Gurney* v. *Krentzman*, No. 75-1056 (5 Cir., Jan. 21, 1975) ..... 10

*Gurney* v. *Young*, No. 76-1329 (5 Cir., Feb. 9, 1976) ..... 10

*Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946) ..... 11

*United States* v. *Giordano*, 416 U.S. 505 (1974) .7,8,9,10

*United States* v. *Zirpolo*, 450 F.2d 424 (3 Cir. 1971) ..... 11

UNITED STATES CONSTITUTION

Fifth Amendment ..... 11

Sixth Amendment ..... 11

STATUTES:

18 U.S.C. §2516(1) ..... 7

28 U.S.C. §1254(1) ..... 2

28 U.S.C. §1861 .....3,10

28 U.S.C. §1864 .....4,6

28 U.S.C. §1865(a) .....5,8

28 U.S.C. §1867(a) ..... 2,3,4,7,9,12,13,14

OTHER AUTHORITIES:

113 Cong.Rec. 34634 (1967) ..... 9

113 Cong.Rec. 35627 (1967) ..... 13

114 Cong.Rec. 3988 (1968) ..... 13

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

---

No.

---

DANIEL J. EVANS, WILLIAM K. BECK,
and GEORGE W. MACFADDEN,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Petitioners, DANIEL J. EVANS, WILLIAM K. BECK and GEORGE W. MACFADDEN, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 15, 1976, denying a petition for rehearing directed to that Court's written opinion dated February 2, 1976. The initial Fifth Circuit opinion affirmed judgments entered by the United States District Court for the Middle District of Florida in a criminal prosecution brought by the United States against the petitioners. The opinion of the United

States Court of Appeals for the Fifth Circuit upheld the District Court's denial of a motion to dismiss the indictment on the ground that the indicting grand jury had been illegally impaneled made pursuant to 28 U.S.C. §1867(a). A timely petition for rehearing was denied by the Court of Appeals and judgment was entered (App. 16a-18a). The petitioners now pray that this Court review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The February 2, 1976, opinion of the United States Court of Appeals for the Fifth Circuit is reported at 526 F.2d 701 (5 Cir. 1976). The corrected slip sheet opinion is set out in the Appendix to this petition (App. 1a-16a).

The order of the United States Court of Appeals for the Fifth Circuit denying rehearing is not presently reported. This order is also set out in the Appendix to this petition (App. 16a-17a).

## JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1976, affirming the trial court's judgments of conviction. The Court of Appeals denied a timely petition for rehearing on March 15, 1976. This petition for certiorari is filed within thirty (30) days of the order of denial. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).



## QUESTIONS PRESENTED

1. Whether the absence of judicial participation in the jury selection process and the failure of the deputy clerks of the district court to comply with the mandatory requirements of the Jury Selection and Service Act of 1968 and the implementing plan of the United States District Court of the Middle District of Florida constitute a "substantial failure to comply" with the Act warranting dismissal of the indictment pursuant to 28 U.S.C. §1867(a).

2. Whether 28 U.S.C. §1867(a) and its legislative history require that an actual showing of prejudice be shown before relief will be granted.

## STATUTORY PROVISIONS INVOLVED

The applicable statutory provision is the Jury Selection and Service Act of 1968, 28 U.S.C. §1861 et seq. which is set out in full in the Appendix (App. 22a-41a). Also set out in the Appendix are pertinent portions of the implementing plan of the United States District Court for the Middle District of Florida as amended on May 31, 1973 (App. 42a-59a).

## STATEMENT OF THE CASE

Petitioners were co-defendants in a criminal prosecution instituted in the United States District Court for the Middle District of Florida. Upon the return of jury verdicts of guilty, judgments of conviction were entered by the District Court as to each petitioner and sentences were imposed.

Prior to trial, the petitioners moved, pursuant to 28 U.S.C. §1867(a), to dismiss the indictment on the ground that the indicting grand jury had been illegally impaneled. Evidentiary hearings on this motion were held on December 19, and 23, 1974. The evidence presented at these hearings established that there had been significant deviations from the statutory and Plan procedures.

Testimony revealed that the drawing of the names of the prospective jurors from the master jury wheel and the mailing of the juror qualification forms was done in violation of 28 U.S.C. §1864 and Section V of the Plan. Both the Act and the Plan mandate that "[f]rom time to time as directed by the district court," the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. However, a massive mailout of 7,915 juror qualification forms to *all persons* in the master jury wheel was employed by the deputy clerks. The district court did not direct this mailout, and there was not a public drawing at random from a master jury wheel of only the names of those persons required for jury service. Also, the clerks failed to prepare an alphabetical list of the names drawn as required by both the Act and Plan. Furthermore, although 123 delivered qualification forms were not executed and returned, the deputy clerks did not summon the unresponsive persons to appear for purposes of executing their juror qualification forms as required by 28 U.S.C. §1864 and Section V of the Plan.

After the juror qualification forms were returned, the deputy clerks determined from the information on



the forms that 1,878 persons were either unqualified, exempt or entitled to be excused from jury service. However, 28 U.S.C. §1865(a) and Section VIII of the Plan provide that "[t]he chief judge of the district court, or such other district court judge as the plan may provide, * * * shall determine * * * whether a person is qualified for, or exempt, or to be excused from jury service." Thus, the clerks improperly usurped the authority of the district judge and clearly violated the Congressional mandate that federal judges are to determine juror disqualifications. 23.7% of all persons called for jury service were excluded without any judicial participation in determining whether these persons should be excluded from jury service.

Finally, the deputy clerks ignored and deviated from the objective criteria of the Act and the Plan through the exercise of arbitrary and subjective standards in selecting the "qualified" jurors. For example, qualified persons were erroneously disqualified due to their student status, their change of residence within the Middle District of Florida, and their short term nonavailability.

In denying the petitioners' motion to dismiss, the trial court found that there had been various deviations from the Plan and the Act including the following by way of example:

(a) After the master jury wheel was created, the deputy clerks mailed juror qualification forms to every name in the wheel rather than drawing as many names as may be required from time to time for the qualified jury wheel as required by 28 U.S.C. §1864(a);

(b) After the juror qualification forms were returned, a deputy clerk determined from information on the forms that 1,878 persons were either unqualified, exempt or entitled to be excused from jury service;

(c) After summonses were mailed to the venire from which the grand jury in question was drawn, approximately 7 persons summonsed were excused from reporting for jury service either on the basis of telephone calls or written correspondence requesting excuse of health or other hardship.

However, the trial court concluded as a matter of law that this evidence did not establish a "substantial failure to comply" with the Act (App. 21a).

The Court of Appeals also held that, although there were numerous deviations from the Act and the Plan in the selection process of the grand and petit juries by which the petitioners were indicted and tried, there was not a "substantial failure to comply" with the Act and the Plan. 526 F.2d 703 (Slip Sheet opinion 1594, App. 4a). Further, the Court of Appeals' opinion



impliedly holds that the petitioners were not entitled to relief because they did not show prejudice. 526 F.2d 703, 706 (Slip Sheet opinion 1594, 1598, App. 3a-4a, 11a-12a).

## REASONS FOR GRANTING THE WRIT

### I.

### The Absence Of Judicial Participation In The Jury Selection Process And The Failure Of The Deputy Clerks Of The District Court To Comply With The Mandatory Requirements Of The Jury Selection And Service Act Of 1968 And The Implementing Plan Of The United States District Court For The Middle District Of Florida Constitute A "Substantial Failure To Comply" With The Act Warranting Dismissal Of The Indictment Pursuant To 28 U.S.C. §1867(a).

This Court, in *United States* v. *Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), held that evidence obtained under a wiretap order must be suppressed when the original wiretap application was approved by the United States Attorney General's Executive Assistant and had not been personally reviewed by the Attorney General or a specially designated Assistant Attorney General as mandated by 18 U.S.C. §2516(1). In so holding, this Court ruled that when Congress establishes detailed procedures for criminal investigations by the Executive Branch there must be absolute compliance with these procedures. This Court construed Section 2516(1) narrowly and said:

> [I]t is apparent that Congress desired to centralize and limit this authority where it was feasible to do so, a desire easily implemented in the federal establishment by confining the authority to approve wiretap applications to the Attorney General or a designated Assistant Attorney General. To us, it appears wholly at odds with the scheme and history of the Act to construe §2516(1) to permit the Attorney General to delegate his authority at will, whether it be to his Executive Assistant or to any officer in the Department other than an Assistant Attorney General. 416 U.S. at 523.

The petitioners submit that the opinion of the United States Court of Appeals for the Fifth Circuit conflicts with the principles of *United States* v. *Giordano*, *supra*. The Fifth Circuit opinion sanctions widespread and significant deviations from the Congressionally mandated procedures of the Jury Selection and Service Act of 1968. The Congressional commands to the Judicial Branch for the selection of grand and petit jurors in criminal cases should be given no less sanctity than those commands to the Executive Branch interpreted in *Giordano*.

Personal judicial involvement in the jury selection process is expressly required by 28 U.S.C. §1865(a). Although this statute specifically provides that the chief judge or other designated judge is to determine excuses, disqualifications, and exemptions, the deputy clerks not only usurped the chief judge's power, they abused it by excluding and including prospective grand and petit jurors without complying with the objective criteria of the Act and Plan. Furthermore, the



deputy clerks failed to follow numerous other provisions of the Act and Plan designed for the random selection of impartial grand and petit juries. (See Statement of the Case, *infra*).

The widespread abuse of the Congressionally mandated procedure for juror selection cannot be classified as merely technical or harmless error as the Fifth Circuit's opinion holds. Congress enacted the Jury Selection and Service Act of 1968 for the purpose of placing the responsibility on the judge and not on the clerk to determine who is to be disqualified, exempted, or excused from jury service. The Act places "ultimate responsibility in the hands of the district judge [and] clearly resolves all doubt about the locus of final supervisory authority over the day-to-day operation of the selection system." Senate Report No. 891, 113 Cong.Rec. 34634 (1967). The procedures employed in the selection of the grand and petit jurors in this case show recurring non-compliance with specific Congressional commands, and these are much greater deviations than that condemned by this Court in *Giordano*.

The opinion of the Fifth Circuit is the first appellate decision interpreting what is a "substantial failure to comply" with the Act so as to warrant dismissal of the indictment pursuant to 28 U.S.C. §1867(a). Rather than following the specific Congressional commands as clearly stated by the Act and its legislative history, the Fifth Circuit opinion holds that violations of both the spirit and the letter of the Congressional schema will be judicially ignored. The legislative history of the Act makes it abundantly clear that Congress stepped

into the jury selection process because there was general dissatisfaction with past patterns of subjectivity, ambiguity, and discrimination. In passing the Act, Congress signaled to the public that objective standards for the selection of federal jurors were established. 28 U.S.C. §1861. Specific responsibilities were given to judges, clerks and jury commissioners

> * * * because broad and cloudy power have been delegated to the court clerk or jury commission without provision for adequate judicial supervision, [and] even judges are often imperfectly aware of the procedures employed in their courts. 113 Cong.Rec. 35628 (1967).

The effect of the Fifth Circuit's opinion is to judicially repeal the Jury Selection and Service Act of 1968. By terming the many violations of the Act in this case as technical or harmless errors, the Act is left "a shadow of itself, an apparition without substance." *United States* v. *Giordano*, 469 F.2d 522, 530 (4 Cir. 1972).

Although this case is the first reported appellate decision to rule on failure to comply with the Act, the absence of judicial involvement in the juror selection process and the arbitrary exclusion of prospective jurors by deputy clerks is not an isolated incident. *See, e.g., Gurney* v. *Young*, No. 76-1329 (5 Cir., Feb. 9, 1976); *Gurney* v. *Krentzman*, No. 75-1056 (5 Cir., Jan. 21, 1975). As in *Giordano*, the failure of the trial courts to follow the Congressional mandates in selecting jurors for both civil and criminal cases will be a recurring question before the United States Courts of Appeals.



The federal courts have long held that court officials cannot violate statutory procedures for the selection of prospective federal jurors, particularly procedures relating to how and by whom this selection should be made. *See, Ballard* v. *United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946); *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States* v. *Zirpolo*, 450 F.2d 424 (3 Cir. 1971); *Abbott* v. *Mines*, 411 F.2d 353 (6 Cir. 1969). These pre-Act cases held that the method for selecting jurors must be guided by the pertinent statutory provisions. Thus, in *Zirpolo*, it was said: "[T]he important consideration is * * * whether authority for the practice may be found in the statute. We conclude not only that the procedure was unauthorized, but that it constituted a patent violation of both the spirit and letter of federal statutory jury selections standards." 450 F.2d at 430. The Fifth Circuit's opinion is contradictory to these previous federal court decisions, including decisions of this Court, as well as a judicial repeal of the Congressional standards enacted in the Jury Selection and Service Act.

Certainly this Court is as concerned as Congress in transmitting a message to the public that objective standards must be applied in the selection of grand and petit federal jurors and that this very important process merits the time and effort of district court judges. This Court, in the exercise of its supervisory power over the administration of justice in the federal courts, must support Congress' intent to give breadth and depth to the Fifth and Sixth Amendments in passing the Act. If the Fifth Circuit opinion is left standing it will put the federal courts and Congress at cross-purposes.

Consequently, this Court should grant certiorari in order to announce that the non-involvement of district court judges in the selection of prospective grand and petit jurors and the arbitrary exclusion of these prospective jurors by deputy court clerks is a "substantial failure to comply" with the Jury Selection and Service Act of 1968.

## II.

### 28 U.S.C. §1867(a) And Its Legislative History Do Not Require That An Actual Showing Of Prejudice Be Shown Before Relief Will Be Granted.

The Fifth Circuit opinion impliedly holds that the petitioners were not entitled to relief because they did not show that they were prejudiced by the improper selection of the grand jury that indicted them and the petit jury that tried them. The Fifth Circuit said: "Nor do they contend that they were in any way prejudiced by error in the selection process." 526 F.2d at 703 (Slip Sheet opinion 1594, App. 4a). The opinion concludes with this language:

> In sum, no person or group was excluded from jury service on the basis of race, color, religion, sex, national origin, or economic status. No person was shown to have been rejected because of any extrastatutory, subjective criteria. The improprieties in the selection process did not operate to frustrate the goals of the Act. 526 F.2d at 706 (Slip Sheet opinion 1598, App. 12a).



28 U.S.C. §1867(a) and its legislative history require only a showing of "substantial failure to comply" with the provisions of the Act; a showing of actual prejudice is not required. When the Act was originally passed by the Senate it required that an indictment would be dismissed only when there was a "substantial failure to comply with the Act *and* such failure was likely to be *prejudicial* to the moving party. 113 Cong. Rec. 35627 (1967). However, the Senate Bill was amended by the House Judiciary Committee and the requirement of showing of prejudice was eliminated:

> A committee amendment to S. 989 eliminates the need to prove prejudice as a condition to judicial intervention when substantial noncompliance with the act is established. The committee believes that the "prejudice" requirement would unduly burden the procedure established by the bill for challenging noncompliance. Moreover, such burden goes beyond what has been required to sustain a constitutional challenge. *See, e.g., Thiel* v. *Southern Pacific Co.*, 66 S.Ct. 984, 328 U.S. 217, 225, 90 L.Ed. 1811. House Report No. 1076, 1968 Cong. & Ad. News, 1792, 1806.

The House of Representatives passed the amended version of the Act, and this amended version was later passed by the Senate. 114 Cong. Rec. 3988, 4004, 6607-6610 (1968). Thus, the Act as passed by Congress simply provides that an indictment will be dismissed if there is a "substantial failure to comply with the provisions of [the Act] in selecting a grand jury, * * *." 28 U.S.C. §1867(a).

The Fifth Circuit's opinion goes beyond the provisions of the Act and its legislative history by requiring a showing of actual prejudice to the moving party. This judicial interpretation effectively amends the Act and writes into the statute what Congress specifically left out. Consequently, this Court should grant certiorari in order to announce that a showing of factual prejudice is not required by the party moving to dismiss an indictment for substantial non-compliance with the Act pursuant to 28 U.S.C. §1867(a).

## CONCLUSION

The questions presented above go to the heart of the process for the impartial and objective selection of jurors in federal criminal and civil cases and the administration of justice in the federal courts. These questions must be answered if there is to be continued public support and acceptance of the federal judicial process. Therefore, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

JAMES M. RUSS
I. PAUL MANDELKERN
Law Offices of James M. Russ
441 First Federal Building
109 East Church Street
Orlando, Florida 32801
Telephone: (305) 849-6050

Attorneys for Petitioners.



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of April, 1976, copies of this Petition for Writ of Certiorari were mailed tc the Honorable Mark L. Horwitz, Assistant United States Attorney, 80 North Hughey Avenue, Orlando, Florida, and to the Honorable Robert H. Bork, Solicitor General of the United States, Office of the Solicitor General, United States Department of Justice, Washington, D.C.

Attorney

## CERTIFICATE OF ATTORNEY

I, JAMES M. RUSS, hereby certify that I am a member of the Bar of the United States Supreme Court in good standing and was admitted to practice by the Court on June 1, 1964.

JAMES M. RUSS

## APPENDIX

1. Opinion of the United States Court of Appeals for the Fifth Circuit in *United States of America* v. *Daniel J. Evans, et al.*, No. 75-1541, dated February 2, 1976.

2. Order of the United States Court of Appeals for the Fifth Circuit in *United States of America* v. *Daniel J. Evans, et al.*, No. 75-1541, dated March 15, 1976, denying petition for rehearing.

3. Judgment of the United States Court of Appeals for the Fifth Circuit in *United States of America* v. *Daniel J. Evans, et al.*, No. 75-1541, dated February 2, 1976.

4. Order of the United States District Court for the Middle District of Florida in *United States of America* v. *William K. Beck, et al.*, No. 74-196-Orl-Cr-R, dated December 24, 1974, denying motion to dismiss indictment.

5. United States Code, Title 28, Sections 1861-1869.

6. Pertinent sections of the Plan of the United States District Court for the Middle District of Florida for the Random Selection of Grand and Petit Jurors, as amended May 31, 1973.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Daniel J. EVANS, William K. Beck,
and George W. MacFadden,
Defendants-Appellants.

No. 75-1541.

United States Court of Appeals,
Fifth Circuit.

Feb. 2, 1976.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge:

William Beck, Daniel Evans, and George MacFadden appeal from judgments of conviction entered after trial by jury in the United States District Court for the Middle District of Florida at Orlando. The indictment charged the appellants in four counts with violations of the federal laws governing the manufacture and use of destructive devices and explosives. Count I charged the appellants with conspiring, in violation of 18 U.S.C. § 371, to manufacture, possess, and use unregistered explosive bombs in violation of 26 U.S.C. § 5861(d) and (f) and 18 U.S.C. § 844(i); the other three counts charged the appellants with failing to register and pay the tax upon certain explosive devices in violation of 26 U.S.C. § 5822. At the close of



the government's case a judgment of acquittal was entered on Count IV; the jury returned verdicts of guilty with respect to the remaining counts.

On this appeal the defendants contend that their convictions should be reversed for four reasons: (1) the procedure employed in the selection of the grand and petit juries by which they were indicted and tried substantially deviated from the requirements of both the federal Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq., and the implementing plan[1] in the Middle District of Florida; (2) violations of grand jury secrecy required a dismissal of the indictment: (3) the government failed to disclose *Brady* material prior to trial; and (4) the introduction of evidence of offenses not mentioned in the indictment was reversible error. In addition, appellant Beck individually contends that the trial court's denial of his motion to sever appellant MacFadden was reversible error. We affirm.

I

Before commencement of trial each defendant, in accordance with 28 U.S.C. §1867(a),[2] moved to dismiss the indictment on the ground of substantial failure to comply with the provisions of the Jury Selection and

---

1 In the Jury Selection and Service Act Congress directed each district court to devise and place into operation a plan consistent with the provisions of the Act. 28 U.S.C. § 1863(a).

2 28 U.S.C. § 1867(a) sets forth the procedure for challenging compliance with jury selection procedures:

> In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

Service Act (the Act) and the Plan in selecting the grand and petit juries. After an evidentiary hearing the trial judge concluded that there had not been a substantial failure to comply with the Act or the Plan and denied the motions. Although we find that in a number of instances there were technical deviations both from the Act and the Plan, we hold that the sum of these departures is not a "substantial failure to comply" within the meaning of 28 U.S.C. § 1867(a).

The appellants do not level a challenge at the *composition* of the grand or petit jury; that is, they do not contend that any segment of the population was systematically excluded from jury service.[3] Nor do they contend that they were in any way prejudiced by errors in the selection process. Rather, they assert that the clerk simply failed to adhere to the procedure set forth in the Act and the Plan. The evidence adduced at the hearing shows that deputy clerks in the Middle District of Florida at Orlando began the process of refilling the master jury wheel on April 19, 1973. Some 7,915 names were randomly drawn from the voter

3 The Constitution forbids the systematic exclusion of identifiable segments of the community from jury panels. In the recent case of *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the Supreme Court observed:

> It should be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to any particular composition [citations omitted], but the *jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.*

419 U.S. at 538, 95 S.Ct. at 702, 42 L.Ed.2d at 703 (emphasis added).



registration lists of the counties that comprise the Orlando division. The clerks then sent juror qualification forms to each of the 7,915 persons. When these questionnaires were returned, the clerks reviewed them to determine which individuals should be exempt,[4] disqualified,[5] or excused.[6] On the basis of in-

4 Section VII of the Plan of the United States District Court for the Middle District of Florida for the random selection of grand and petit jurors provides that members of the following groups are exempted from jury service.

1. Members in active service in the Armed Forces of the United States.
2. Members of the fire or police departments of any state, district, territory, possession or subdivision thereof.
3. Public officers in the executive branches of the Government of the United States, or any territory or possession thereof, who are actively engaged in the performance of official duties.

5 Section VII of the Plan provides that a potential juror shall be deemed qualified to serve on grand and petit juries unless he

1. is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
2. is unable to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
3. is unable to speak the English language;
4. is incapable by reason of mental or physical infirmity to render satisfactory jury service; or
5. has a charge pending against him for the commission of or has been convicted in a state court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

6 Section VI of the Plan provides for excuse from jury service, upon request, of members of the following groups:

1. Actively engaged members of the clergy.
2. Women who have legal custody of a child or children under the age of 10 years.
3. Actively practicing attorneys, physicians, dentists, and registered nurses.
4. Persons who have served as grand or petit jurors in a federal court within the past two years.
5. All persons over 70 years of age at the time of executing the jury qualification form.

In addition, the Plan provides that "[t]he court may, in its discre-

formation on the 7,318 completed jury questionnaires, deputy clerks determined that 1,878 people should be excused, exempt, or disqualified from jury service. The remaining 5,440 names were placed in the qualified jury wheel. Both the grand jury that indicted the appellants and the petit jury that tried them were drawn from this qualified wheel. It also appears that after the drawing of names for the grand jury by which appellants were indicted, several persons were excused or deferred for reasons asserted in a phone call or personal visit to the clerk's office.

Appellants cite numerous instances in which the procedure followed by the Orlando clerks allegedly deviates from the dictates of the Act and the Plan. For example, there should not have been an en masse mailing of juror qualification forms to every person in the master jury wheel. The Act and the Plan[7] provide that the names of as many persons as may be required for jury service shall be drawn from the master wheel "from time to time." Juror qualification forms are required to be mailed to all such persons whose names are drawn from the wheel.

The most glaring irregularity in this selection process, according to the appellants, was the clerks'

tion, excuse persons summoned for jury service upon a showing of undue hardship, extreme inconvenience, or other grounds of exclusion as set forth in section 1866 of the Act, for such period of time as the court may deem necessary and proper."

7 Section V(a) of the Plan, which incorporates the provisions of 28 U.S.C. § 1864, provides in part:

> From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service . . . The clerk . . . shall mail every person whose name is drawn from the master jury wheel a juror qualification form accompanied by instructions to fill out and return the form . . .



usurpation and abuse of the judicial function of determining excuses, exemptions, and disqualifications. Testimony taken at the hearing revealed that most of the decisions on excuses, exemptions, and disqualifications were made by the clerks themselves, although in questionable cases the clerks consulted the chief judge. The chief judge submitted a written statement in which he acknowledged that even though he did not by written order authorize the deputy clerks to grant excuses, he was "aware of the course of action pursued by the clerks and conferred frequently with each of the clerks in chambers concerning requests to be excused and the grounds therefor."

The appellants argue that 28 U.S.C. § 1865(a) and Section III of the Plan entrust the chief judge with the power to determine excuses, disqualifications, and exemptions, and that the absence of judicial supervision is fatal to the indictment. Although the statute specifically provides that in making these determinations the chief judge may act upon the recommendation of the clerk, counsel for appellants at oral argument, contended that deputy clerks simply do not have the legal knowledge to make the ultimate decisions.

Appellants argue that not only did the clerks usurp the chief judge's power, they abused it. They enumerate several instances[8] where the clerks

8 The data on which appellants rely to demonstrate arbitrariness was accumulated in an *ex parte* analysis of all the juror qualification forms that were returned. The results of this analysis were never introduced into evidence, although the appellants state that the district court relied on the data in reconsidering the motion to dismiss because of deviations from the Act and the Plan in the selection of the jury panels. The validity of this analysis was seriously challenged by the government both in its brief and at oral argument.

deviated from the Plan. For example, it appears that not all citizens over 70 years old were exempted,[9] as the Plan required. The result of this deviation was that the names of some senior citizens were *included* in the qualified jury wheel. The appellants cite a number of instances where the clerks deemed qualified firemen, policemen, and servicemen who, under Section VII of the Plan and § 1863(b)(6) of the Act, should have been exempted. The result of this deviation was, again, an *inclusion* of names of persons who should have been considered exempt.

The appellants further cite apparently inconsistent instances of the treatment of women with young children, who, under Section VI of the Plan, should have been excused if they so requested. According to testimony at the hearing below, the clerks did not excuse working mothers of young children, even if they so requested.[10] Again, this variance from the Plan resulted in an *inclusion* of a group arguably entitled to be excused. There may also have been disparate treatment of the sick[11] and of those who indicated jury service within the past two years,[12] but again the end result of these deviations appears to be an *inclusion* of names that should not have been included.[13]

9 At one time during the selection process, the Plan provided that persons over 70 years old should be exempt from jury service. The Plan was amended in 1973 to provide that those over 70 should be excused upon request, rather than exempted. See note 6, *supra*.

10 The clerks apparently felt that the excuse for mothers of young children was premised on the need of these mothers to be at home with their children. They felt that if a mother were employed outside the home, she should not be permitted to avail herself of this excuse.

11 An excuse for reasons of physical health, unless accompanied by a doctor's certificate, was not honored if it appeared from the questionnaire that the potential juror was employed. The clerks apparently reasoned that a person healthy enough to work would be physically able to render jury service.



The appellants also allege additional deviations from the Act and the Plan: the failure of the clerks to prepare an alphabetical list of all the names drawn from the master jury wheel; the failure to prepare a Jury Selection Report; and the failure to replace in the qualified jury wheel the names of those persons who were excused or temporarily deferred from jury service.

Congress, recognizing that there would undoubtedly be error in the jury selection process that should not result in the dismissal of an indictment, left room for harmless error by providing that dismissal should lie only when there was a *substantial* failure to comply with the Act. An analysis of the question whether there has been substantial compliance with the Act requires a review of the purpose of the Act and its underlying policy. Section 1861 contains the declaration of policy:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the

12 Section VI of the Plan provides for excuse *upon request* of persons who have served on federal juries. *See* note 6, *supra*. One obvious reason that some members of this group may not have been excused is their failure to file a request.

13 Once a group of jurors was called for actual service, any member of that group who felt himself entitled to an exemption, excuse, or disqualification could have presented the relevant facts to the judge conducting voir dire examination and been reclassified at that time.

> community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

Section 1862 implements this cross-sectional policy by proscribing discrimination in the selection process:

> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

According to the legislative history, H.R. 1076, 90th Cong., 2d Sess., U.S. Code Cong. & Admin. News, 1968, p. 1792 the Act

> . . . embodies two important general principles: (1) random selection of juror names from the voter lists of the district or division in which court is held; and (2) determination of juror disqualifications, excuses, exemptions, and exclusions on the basis of objective criteria only. These principles provide the best method for obtaining jury lists that represent a cross section of the relevant community and for establishing an effective bulwark against impermissible forms of discrimination and arbitrariness.



*Id.* at 1793. The appellants have not shown a contravention of either of these principles. They do not even allege that the original 7,915 names were not randomly selected as required by the first principle.

Nor have appellants shown that in determining juror qualifications the clerks applied any non-objective criteria in violation of the second principle. The legislative history indicates that this principle was adopted to prevent the "widespread current practice of imposing qualifications above and beyond those specified by Congress." *Id.* at 1795. Jury officials had treated the juror qualifications in the act that preceded the legislation now in force merely as minimum qualifications to which they added such subjective notions as "good character" and "sound judgment." This practice, though perhaps well-intentioned, had on occasion produced discriminatory results. *See Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966) (en banc).

The evidence does not establish that the Orlando clerks applied only extra-statutory, subjective criteria in the screening process. Rather, the clerks determined juror qualifications solely on the basis of the criteria specified in the Act and without a discriminatory result. While some technical errors were made, the fact that clerks, rather than a judge made these determinations does not necessitate reversal. *Cf. United States v. Butera*, 420 F.2d 564, 574 (1st Cir. 1970).

The only post-Act authority upon which the appellants rely is *United States v. Zirpolo*, 450 F.2d 424 (3d Cir. 1973). The *Zirpolo* court found that the challenged jury selection procedure, in which there

was no finding by a district judge of the statutory criteria for exclusion, exemption, and disqualification, constituted a patent violation of both the spirit and the letter of the Act. The procedure followed in *Zirpolo*, however, had favored males over females in a two-to-one ratio, frustrating the Act's goal of a representative cross-section of the community. In the case now before us there has been no showing of a thwarting of the Act's goals. The overwhelming majority of the errors alleged to have been committed by clerks in the screening process appear to have resulted not in the discriminatory exclusion from jury service against which the Act was intended to safeguard, but rather in the *inclusion* of persons who perhaps should have been relieved of jury duty. There may have been isolated examples of mistaken exclusion, but these alone do not afford a valid basis for challenging the grand jury.[14] *United States v. Matthews*, 350 F.Supp. 1103 (D.Del. 1972).

In sum, no person or group was excluded from jury service on the basis of race, color, religion, sex, national origin, or economic status. No person was shown to have been rejected because of any extra-statutory, subjective criteria. The improprieties in the selection process did not operate to frustrate the goals of the Act. While we in no way mean to imply that the role of the judiciary should be lightly regarded, we conclude that these deviations in the selection process do not constitute a substantial failure to comply with the Act or the Plan.

---

14 Appellants have challenged both the grand and petit jury panels. The bulk of their arguments, however, concerns the grand jury selection process.



II

We find appellants' other contentions less troublesome. They complain that there was a violation of Fed.R.Crim.P. 6(e), which prohibits the disclosure of matters occurring before the grand jury to anyone other than a government attorney. The basis for this complaint is that several documents subpoenaed by the grand jury were later turned over to a special agent from the Treasury Department in the Alcohol, Tobacco and Firearms Bureau. This agent was assisting the United States Attorneys in their investigation of the case. Representatives of government agencies actively assisting United States Attorneys in a grand jury investigation and working under their direction may lawfully have access to grand jury material in the performance of their duties. *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965), *aff'd*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374, *reh. den.*, 386 U.S. 940, 951, 87 S.Ct. 970, 17 L.Ed.2d 880 (1966); *In re 1973 Grand Jury*, 374 F.Supp. 1334, 1337 (N.D.Ill.1973); *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 475 (E.D.Pa.1971); *United States v. Anzelmo*, 319 F.Supp. 1106, 1116 (E.D.La. 1970).

III

The appellants' third contention is that the government violated the dictates of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose prior to trial certain evidence favorable to the accused: the fact that the dynamite bomb described in Count IV of the indictment was incapable of detonation. Count IV charged the appellants with manufac-

turing a destructive device in violation of 26 U.S.C. § 5822. Testimony elicited during the government's case-in-chief established that on two occasions the government had unsuccessfully attempted to detonate the bomb. A judgment of acquittal was entered as to Count IV, and the appellants moved for a mistrial. They contended that the government's failure to disclose prior to trial this allegedly favorable fact violated their rights of due process. They further argued that if the government had disclosed the fact of non-detonation, they could have moved to dismiss Count IV from the outset and this prejudicial evidence would never have come before the jury. The motion was denied.

There was no error in the denial of this motion. At the outset, it should be noted that this supposedly favorable evidence was not suppressed. Moreover, we are not convinced that non-detonation of the destructive device is necessarily favorable to the accused. 26 U.S.C. § 5845(f)(3) defines a destructive device as "any combination of parts either *designed or intended for use* in converting any device into a destructive device . . ." (emphasis added). The statute apparently does not require that a device be successfully detonated before it can be considered a bomb. Expert witnesses testified that the device was a dynamite bomb and that it might have been capable of detonation if the dynamite had been permitted to dry. Lastly, testimony regarding this bomb would have been admissible under Count I, which charged a conspiracy, even if the court had dismissed Count IV before trial.



IV

In Count I the appellants were charged with conspiring to manufacture and use destructive devices. Fifteen overt acts were alleged in furtherance of the conspiracy. At trial a government witness testified to numerous criminal acts by the appellants not alleged in the indictment, but occurring during the life of the conspiracy. Before the testimony was received the trial court instructed the jury, "The testimony is being admitted for whatever probative value, if any, it might have as evidence that a conspiratorial agreement existed as alleged in Count One of the indictment." These other criminal acts were closely connected in time and nature to the overt acts alleged in Count I; their admission into evidence is not reversible error. *United States v. Crockett*, 514 F.2d 64 (5th Cir. 1975); *United States v. Arias-Diaz*, 497 F.2d 165, 170 (5th Cir. 1974); *United States v. Gonzalez*, 491 F.2d 1202, 1205 (5th Cir. 1974); *United States v. Nakaladski*, 481 F.2d 289, 296 (5th Cir. 1973).

V

Finally, there was no abuse of discretion in the denial of Beck's motion, at the close of the government's case, that MacFadden be severed so that he could present testimony favorable to Beck. In *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970), we set forth guidelines to aid trial courts presented with motions to sever based on the desire to offer exculpatory testimony of a codefendant. We stated that an inquiry may be made into the likelihood that the codefendant would be willing to testify if the defendant is tried

separately. Beck did not show that there was a likelihood that MacFadden would be willing to testify at a separate trial when he was unwilling to testify in a joint trial. *See United States v. Burke*, 495 F.2d 1226, 1233 (5th Cir. 1974); *Gorin v. United States*, 313 F.2d 641, 646 (1st Cir. 1963). Persons jointly indicted, as a general rule, should be jointly tried, especially in conspiracy cases. *United States v. Perez*, 489 F.2d 51 (5th Cir. 1973), *cert. denied*, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974); *United States v. Hutchinson*, 488 F.2d 484 (8th Cir. 1973). The motion came at the close of a lengthy government case. Considerations of administration and judicial economy weigh in favor of the court's denial of the motion.

Affirmed.

---

United States Court of Appeals
Fifth Circuit
Office of the Clerk
March 15, 1976

Edward W. Wadsworth
Clerk

TO ALL COUNSEL OF RECORD

No. 75-1541-USA v. Daniel J. Evans, William K. Beck, and George W. MacFadden

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no



member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

/s/ SUSAN M. GRAVOIS
Deputy Clerk

/smg
cc: Mr. James M. Russ
Mr. Mark L. Horwitz

United States Court of Appeals
for the Fifth Circuit

October term, 1975

No. 75-1541

D.C. Docket No. CR-74-196-Orl-R

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

DANIEL J. EVANS, WILLIAM K. BECK, and GEORGE W. MacFADDEN,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 2, 1976



United States District Court
Middle District of Florida
Orlando Division

UNITED STATES OF AMERICA

vs. No. 74-196-ORL-CR-R

WILLIAM K. BECK, et al.

ORDER

This cause came on for hearing on 19 December 1974 on the motion of the defendant William K. Beck to dismiss the indictment on the ground that the grand jury which indicted him was not selected in accordance with 28 U.S.C. § 1861 et seq. The motion was filed 29 November 1974.

Evidence was presented to the Court from which the Court makes the following findings of fact:

1. The master jury wheel for the Orlando Division was last refilled on 19 April 1973. The name source used was voter registration lists maintained by the Supervisors of Elections in the various counties comprising the Orlando Division.

2. After the names were selected for inclusion in the master jury wheel (which process is not in issue in connection with the motion), there were various

deviations from the jury plan adopted for this district, as well as the requirements of 28 U.S.C. § 1861 et seq., in establishing the qualified jury wheel, as well as in selecting the panel from which the grand jury which indicted the defendant was ultimately drawn. For example:

(a) After the master jury wheel was created, the deputy clerks mailed juror qualification forms to every name in the wheel rather than drawing as many names as may be required from time to time for the qualified jury wheel as required by 28 U.S.C. § 1864(a);

(b) After the juror qualification forms were returned, a deputy clerk determined from information on the forms that 1878 persons were either unqualified, exempt or entitled to be excused from jury service;

(c) After summonses were mailed to the venire from which the grand jury in question was drawn, approximately seven persons summonsed were excused from reporting for jury service either on the basis of telephone calls or written correspondence requesting excuse on the basis of health or other hardship.

3. The evidence affirmatively reveals, however, that in no instance was anyone excused on the basis of race, color, religion, sex or national origin, and in the process of excusing, exempting or disqualifying persons for jury service, the deputy clerk applied only the criteria authorized by Chapter 121, Title 28, United States Code, and incorporated in the jury plan for this district.



4. There was no evidence to indicate that the major purposes of Chapter 121, to-wit: to provide a broad right to serve on grand and petit juries and the selection of grand and petit juries from a fair cross section of the community, were in anywise subverted by the management of the jury plan in the manner aforesaid.

The Court concludes as a matter of law that the evidence did not establish a substantial failure within the contemplation of 28 U.S.C. § 1867(a) to comply with provisions of Chapter 121 or the jury plan. For that reason, the Motion to Dismiss should be denied. Compare *Rabinowitz v. U.S.*, 366 F.2d 34, CA5, 1966.

It is, therefore,

ORDERED that the aforesaid Motion to Dismiss be and the same is hereby denied.

DONE AND ORDERED in Chambers at Orlando, Florida, this 24th day of December, 1974.

/s/ JOHN A. REED, JR.
Judge

[Filed: Dec. 24, 1974]

UNITED STATES CODE, Title 28.

**§ 1861. Declaration of policy**

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

As amended Sept. 9, 1957, Pub.L. 85-315, Part V, § 152, 71 Stat. 638; March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

**§ 1862. Discrimination prohibited**

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

As amended March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

**§ 1863. Plan for random jury selection**

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to



achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promply notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall —

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. If the plan establishes a jury commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: *Provided, however,* That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in the judicial district or division for which he is appointed. Each citizen jury commissioner shall receive compensation to be fixed by the district court plan at a rate not to exceed $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The



plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the district of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title.

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or

the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed four years.

(5) specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.



(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

(7) fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefor, be excused from jury service on the ground of undue hardship in traveling to the place where court is held.

(8) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(9) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and twenty days of the date of enactment of the Jury Selection and Service Act of 1968. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.



As amended March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53; April 6, 1972, Pub.L. 92-269, § 2, 86 Stat. 117.

**§ 1864. Drawing of names from the master jury wheel; completion of juror qualification form**

(a) From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The clerk or jury commission shall prepare an alphabetical list of the names drawn, which list shall not be disclosed to any person except pursuant to the district court plan and to sections 1867 and 1868 of this title. The clerk or jury commission shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk or jury commission by mail within ten days. If the person is unable to fill out the form, another shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk or jury commission shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the clerk or jury commission within ten days. Any person who fails to return a completed juror qualification form as instructed may be summoned by the clerk or jury commission forthwith to appear before the clerk or jury commission to fill out a juror qualification form. A person summoned to appear because of failure to return a juror qualification form as instructed who personally appears and executes a juror qualification

form before the clerk or jury commission may, at the discretion of the district court, except where his prior failure to execute and mail such form was willful, be entitled to receive for such appearance the same fees and travel allowances paid to jurors under section 1871 of this title. At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence of the jury commission or the clerk or the court, at which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the clerk or jury commission may be noted on the juror qualification form and transmitted to the chief judge or such district court judge as the plan may provide.

(b) Any person summoned pursuant to subsection (a) of this section who fails to appear as directed shall be ordered by the district court forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such order or who fails to show good cause for noncompliance with the summons may be fined not more than $100 or imprisoned not more than three days, or both. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than three days, or both.

As amended March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.



**§ 1865. Qualifications for jury service**

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt,or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he —

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

As amended March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53; April 6, 1972, Pub.L. 92-269, § 1, 86 Stat. 117.

**§ 1866. Selection and summoning of jury panels**

(a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place in such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

(b) When the court orders a grand or petit jury to be drawn, the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors.

Each person drawn for jury service may be served personally, or by registered or certified mail addressed to such person at his usual residence or business address.



If such service is made personally, the summons shall be delivered by the clerk or the jury commission or their duly designated deputies to the marshal who shall make such service.

If such service is made by registered or certified mail, the summons may be served by the clerk or jury commission or their duly designated deputies who shall make affidavit of service and shall file with such affidavit the addressee's receipt for the registered or certified summons. If such service is made by the marshal, he shall attach to his return the addressee's receipt for the registered or certified mail.

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5), (6), or (7) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be (1) excused by the court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person shall be summoned again for jury service under subsections (b) and (c) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely

affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title. The number of persons excluded under clause (5) of this subsection shall not exceed one per centum of the number of persons who return executed jury qualification forms during the period, specified in the plan, between two consecutive fillings of the master jury wheel. The names of persons excluded under clause (5) of this subsection, together with detailed explanations for the exclusions, shall be forwarded immediately to the judicial council of the circuit, which shall have the power to make any appropriate order, prospective or retroactive, to redress any misapplication of clause (5) of this subsection, but otherwise exclusions effectuated under such clause shall not be subject to challenge under the provisions of this title. Any person excluded from a particular jury under clause (2), (3), or (4) of this subsection shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on such other jury.

(d) Whenever a person is disqualified, excused, exempt, or excluded from jury service, the jury commission or clerk shall note in the space provided on his juror qualification form or on the juror's card drawn from the qualified jury wheel the specific reason therefor.

(e) In any two-year period, no person shall be required to (1) serve or attend court for prospective service as a petit juror for a total of more than thirty days, except when necessary to complete service in a particular case, or (2) serve on more than one grand jury, or (3) serve as both a grand and petit juror.



(f) When there is an unanticipated shortage of available petit jurors drawn from the qualified jury wheel, the court may require the marshal to summon a sufficient number of petit jurors selected at random from the voter registration lists, lists of actual voters, or other lists specified in the plan, in a manner ordered by the court consistent with sections 1861 and 1862 of this title.

(g) Any person summoned for jury service who fails to appear as directed shall be ordered by the district court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than three days, or both.

As amended May 24, 1949, c. 139, § 96, 63 Stat. 103; March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53; Dec. 11, 1970, Pub.L. 91-543, 84 Stat. 1408.

**§ 1867. Challenging compliance with selection procedures**

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indict-

ment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial



failure to comply with the provisions of this title in selecting a grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title, or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States from pursuing any other remedy, civil or criminal which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b) (4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or

paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

As amended Sept. 2, 1957, Pub.L. 85-259, 71 Stat. 583; March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

**§ 1868. Maintenance and inspection of records**

After the master jury wheel is emptied and refilled pursuant to section 1863(b) (4) of this title, and after all persons selected to serve as jurors before the master wheel was emptied have completed such service, all records and papers compiled and maintained by the jury commission or clerk before the master wheel was emptied shall be preserved in the custody of the clerk for four years or for such longer period as may be ordered by a court, and shall be available for public inspection for the purpose of determining the validity of the selection of any jury.

As amended March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53.

**§ 1869. Definitions**

For purposes of this chapter —

(a) "clerk" and "clerk of the court" shall mean the clerk of the district court of the United States or any authorized deputy clerk;

(b) "chief judge" shall mean the chief judge of any district court of the United States;



(c) "voter registration lists" shall mean the official records maintained by State or local election officials of persons registered to vote in either the most recent State or the most recent Federal general election, or, in the case of a State or political subdivision thereof that does not require registration as a prerequisite to voting, other official lists of persons qualified to vote in such election. The term shall also include the list of eligible voters maintained by any Federal examiner pursuant to the Voting Rights Act of 1965 where the names on such list have not been included on the official registration lists or other official lists maintained by the appropriate State or local officials. With respect to the districts of Guam and the Virgin Islands, "voter registration lists" shall mean the official records maintained by territorial election officials of persons registered to vote in the most recent territorial general election;

(d) "lists of actual voters" shall mean the official lists of persons actually voting in either the most recent State or the most recent Federal general election;

(e) "division" shall mean: (1) one or more statutory divisions of a judicial district; or (2) in statutory divisions that contain more than one place of holding court, or in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district court plan shall determine: *Provided*, That each county, parish, or similar political subdivision shall be included in some such division;

(f) "district court of the United States", "district court", and "court" shall mean courts constituted under chapter 5 of title 28, United States Code, section 22 of the Organic Act of Guam, as amended (64 Stat. 389; 48 U.S.C. 1424), section 21 of the Revised Organic Act of the Virgin Islands (68 Stat. 506; 48 U.S.C. 1611), and section 1 of title 3, Canal Zone Code; except that for purposes of sections 1861, 1862, 1866(c), 1966(d), and 1867 of this chapter such terms shall include the Superior Court of the District of Columbia;

(g) "jury wheel" shall include any device or system similar in purpose or function, such as a properly programed electronic data processing system or device;

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, race, occupation, education, length of residence within the judicial district, distance from residence to place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as juror, is able to read, write, speak, and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable by imprisonment for more than one year, or has been convicted in any State or Federal court of record of



a crime punishable by imprisonment for more than one year and has not had his civil rights restored by pardon or amnesty. The form shall request, but not require, any other information not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form shall also elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his religion, national origin, or economic status is not a prerequisite to his qualification for jury service, that such information need not be furnished if the person finds it objectionable to do so, and that information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service.

(i) "public officer" shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office.

As amended Oct. 16, 1963, Pub.L. 88-139, § 2, 77 Stat. 248; March 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 53; July 29, 1970, Pub.L. 91-358, Title I, § 172(b), 84 Stat. 590; Sept. 27, 1972, Pub.L. 92-437, § 1, 86 Stat. 740.

PLAN

OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA (28 U.S.C. Section 89(b) ) FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS

Pursuant to the Jury Selection and Service Act of 1968 (Public Law 90-74), the following plan is hereby adopted by this court, subject to approval by a reviewing panel and to such rules and regulations as may be adopted from time to time of the Judicial Conference of the United States. Section numbers cited herein shall refer to that Act.

I. *Applicability of Plan:*

For jury selection purposes, pursuant to Section 1869(e), the Middle District of Florida is hereby divided into divisions, identical to those created in Rule One, General Rules of this court, as follows:

A. Jacksonville division consisting of the counties of Baker, Bradford, Clay, Columbia, Duval, Flagler, Hamilton, Madison, Nassau, Putnam, St. Johns, Suwannee, Union and Volusia.

B. Ocala division consisting of the counties of Citrus, Lake, Marion and Sumter.

C. Orlando division consisting of the counties of Brevard, Orange, Osceola and Seminole.



D. Tampa division consisting of the counties of Hardee, Hernando, Hillsborough, Manatee, Pasco, Pinellas, Polk and Sarasota.

E. Fort Myers division consisting of the counties of Charlotte, DeSoto and Lee.

Provisions of this plan apply to all divisions of the district unless specifically indicated otherwise.

II. *Policy:* This plan is adopted pursuant to and in recognition of the congressional policy declared in Title 28 United States Code as follows:

"§ 1861 Declaration of policy.

"It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."

"§ 1862 Discrimination prohibited.

"No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color,

religion, sex, national origin or economic status."

III. *Management and Supervision of Jury Selection Process:*

It is the intention of this plan that management and supervision shall be separately accomplished in each of the divisions. (Section I this plan). The clerk of this court, or one or more of his deputies, as directed by the clerk, is authorized to manage the jury selection process, acting under the supervision and control of the Chief Judge of this court. In the event of absence or disability of the Chief Judge, the Judge in active service and senior in commission shall serve. The Judge to whom the work of a division of this court is assigned by the Chief Judge by general order shall be in charge of the day to day operation of the jury selection process in that division (i.e., such Judge shall, as needed, order the addition of names to the wheel, the drawing of names therefrom, the granting of temporary excuses, etc.).

IV. *Random Selection from Voter Lists and Master Jury Wheels:*

A. Voter registration lists represent a fair cross section of the communities in the several divisions of the Middle District of Florida. Accordingly, the names of grand and petit jurors serving on or after the effective date of this plan shall be selected at random from the voter registration lists of all the counties within the relevant division.



B. The clerk or deputy clerk shall maintain a master jury wheel for each of the divisions within the district. The master jury wheel shall consist of a master jury box, a device similar in purpose and function to a wheel (Section 1869(g) ). The names of all persons randomly selected from the voter registration lists of the counties in a division shall be placed in the master jury wheel for that division. Each master jury wheel shall be emptied and refilled during the period June 1 - November 30, 1971, and each fifth year thereafter.

C. The minimum number of names to be placed initially in these master jury wheels shall be as follows:

(1) Jacksonville division, 6,000 names.
(2) Ocala division, 3,000 names.
(3) Orlando division, 6,000 names.
(4) Tampa division, 60,000 names.
(5) Fort Myers division, 3,000 names.

These numbers are as large as they are to allow for the possibility that some juror qualification forms, hereinafter mentioned, will not be returned, that some prospective jurors may be exempted by law, and that some may not comply with the statutory qualifications. The court may order additional names to be placed in the master jury wheels from time to time as necessary. If the above numbers are less than one-half of one percent of the total number of registered voters for the division, the court concludes that such percentage number of names is unnecessary and cumbersome.

D. The clerk shall ascertain the total number of registered voters for each division and divide that number by the number of names to be selected for the master jury wheel from that division. For example, if there are 660,000 registered voters in a division, that number will be divided by 6,000 producing the quotient of 110. Then he shall draw by lot a starting number which is not less than one and not greater than 110 and the name corresponding to that number shall be selected from the voter registration list of each county in that division along with each 110th name thereafter. Thus, if the starting number is 10, the 10th, 120th, 230th, 340th, etc., names shall be picked from the registration list of each county of that division. If a voter registration list of a county is not available as such, the precinct lists or other separate lists shall be combined for the purpose of implementing this plan.

E. This plan is based on the conclusion and judgment that the policy, purpose and intent of the Jury Selection and Service Act of 1968 will be fully accomplished and implemented by the use of voter registration lists, as supplemented by the inclusion of subsequent registrants to the latest practicable date, as the source of an at random selection of prospective grand and petit jurors who represent a fair cross-section of the community. This determination is supported by all the information this Court has been able to obtain after diligent effort on its part and after full consultation with the Fifth Circuit Jury Working Committee and the Judicial Council of the Fifth Circuit. In order to assure the continuous implementation of the policy, purpose and intent of the Jury Selection and Service Act, a report will be made to the Reviewing Panel on or before March 1, 1969, showing a tabulation by race and sex of all prospective jurors, qualified and unqualified, based upon returns of Juror Qualification Forms from a mailing of such forms to 20% of the total number of persons placed in the Master Jury Wheel or 1,000 persons, whichever is greater.



V. *Drawing of names from the Master Jury Wheel; Completion of Jury Qualification Form*

This plan hereby incorporates the provisions of 28 U.S.C.A. § 1864, which reads as follows:

> "(a) From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The clerk . . . shall prepare an alphabetical list of the names drawn, which list shall not be disclosed to any person except pursuant to the district court plan and to sections 1867 and 1868 of this title (28). The clerk . . . shall mail to every person whose name is drawn from the master jury wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk . . . by mail within ten days. If the person is unable to fill out the form, another shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk . . . shall return the form with instructions to the person to make

such additions or corrections as may be necessary and to return the form to the clerk . . . within ten days. Any person who fails to return a completed juror qualification form as instructed may be summoned by the clerk . . . forthwith to appear before the clerk . . . to fill out a juror qualification form. A person summoned to appear because of failure to return a juror qualification form as instructed who personally appears and executes a juror qualification form before the clerk . . . may, at the discretion of the district court, except where his prior failure to execute and mail such form was willful, be entitled to receive for such appearance the same fees and travel allowances paid to jurors under section 1871 of this title. At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence of . . . the clerk or the court, at which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the clerk . . . may be noted on the juror qualification form and transmitted to the chief judge or such district court judge as the plan may provide.

"(b) Any person summoned pursuant to subsection (a) of this section who fails to appear as directed shall be ordered by the district court forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such



order or who fails to show good cause for non-compliance with the summons may be fined not more than $100 or imprisoned not more than three days, or both. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than three days, or both."

(Note: in copying the above code section all references to jury commission have been deleted since this plan does not call for a jury commission).

The clerk shall comply with Section 1864, *supra*, as effectuated by this plan.

VI. *Excuses on Individual Request:*

This court hereby finds that jury service by members of the following occupational classes or groups of persons would entail undue hardship or extreme inconvenience to the members thereof, and the excuse of such members will not be inconsistent with the Act, and shall be granted upon individual request:

(1) Actively engaged members of the clergy.

(2) Women who have legal custody of a child or children under the age of 10 years.

(3) Actively practicing attorneys, physicians, dentists and registered nurses.

(4) Persons who have served as grand or petit jurors in a federal court within the past two years;

The court may, in its discretion, excuse persons summoned for jury service upon a showing of undue hardship, extreme inconvenience, or other ground of exclusion as set forth in section 1886 of the Act, for such period of time as the court may deem necessary and proper.

VII. *Exemption from Jury Service:*

This court hereby finds that exemption of the following groups of persons or occupational classes is in the public interest and would not be inconsistent with the Act, and accordingly, members of such groups are exempted from jury service:

(1) Members in active service in the Armed Forces of the United States;

(2) Members of the fire or police departments of any state, district, territory, possession or subdivision thereof;

(3) Public officers in the executive, legislative, or judicial branches of the Government of the United States, or any state, district, territory or possession or subdivision thereof, who are actively engaged in the performance of official duties (public officer shall mean a person who is either elected to public office or



who is an officer directly appointed by a person elected to public office); and

(4) All persons over 70 years of age at the time of executing the jury qualification form.

VIII. *Determination of Qualifications, Excuses and Exemptions:*

This plan hereby incorporates the applicable provisions of 28 U.S.C.A. § 1865, which reads as follows:

"(a) The chief judge of the district court or such other district court judge as the plan may provide, on his initiative or upon the recommendation of the clerk . . ., shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

"(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he

"(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

"(2) is unable to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

"(3) is unable to speak the English language;

"(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

"(5) has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty."

(Note: In copying the above code section the reference to jury commission has been deleted since this plan does not call for a jury commission).

The judge, on his initiative or upon recommendation of the clerk of the court, shall determine solely on the basis of information provided on the jury qualification form whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the jury qualification form and the master list



drawn. If a person did not appear in response to a summons, such fact shall be noted on said list.

IX. *Qualified Jury Wheel.*

The clerk shall also maintain separate qualified jury wheels or boxes, hereinafter referred to as qualified jury wheels, for each division in the district and shall place in such wheels the names of all persons drawn at random from the master jury wheels and not disqualified, exempt, or excused pursuant to this plan. Each qualification form as called for by Section 1864, *supra*, shall, where possible, bear the number which its addressee bears on the voter list. The clerk shall insure that at all times at least 300 names are contained in each such qualified jury wheel over and above and exclusive of the names of jurors previously drawn from such qualified jury wheel. The qualified jury wheel in each division shall be emptied and re-supplied with names at the same time the master jury wheel for that division is emptied and re-supplied.

X. *Drawing of and Assignment to Jury Panels:*

A. From time to time, when so ordered by the court, the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels, and the clerk shall prepare a separate list of names of persons assigned to each grand and petit panel. These names may be disclosed by the clerk to parties and to the public after said list is prepared; provided, however, the court may at any time or from time to time order generally, or with respect to any

particular term or terms of court, that these names be kept confidential in any case where in the court's judgment the interest of justice so requires. (28 U.S.C.A. § 1863(b)(8) & (9) ).

B. Upon drawing the required number of names of persons for assignment to grand or petit jury panels, the Clerk shall issue summonses for the required number of jurors and deliver them to the marshal for service. Each person drawn for jury service may be served personally or by registered or certified mail addressed to such person at his usual residence or business addresss. Such service shall be made by the marshal, who shall attach to his return the addressee's receipt for the registered or certified summons where service is made by mail. (1866(b) ).

XI. *Grand Juries:*

A centralized grand jury in Jacksonville shall serve the Jacksonville and Ocala divisions and a centralized grand jury in Tampa shall serve the Tampa and Fort Myers divisions. A grand jury in Orlando shall serve that division. A pro rata or approximately pro rata number of names drawn at random from the qualified jury wheel of each relevant division shall be pooled to obtain the grand jury array for grand juries at Jacksonville and Tampa respectively.

XII. *Effective Date:*

This plan shall be implemented immediately after approval by a reviewing panel consisting of the



members of the Judicial Council of the Fifth Circuit and the Chief Judge of this court.

## AMENDMENTS TO PLAN

## OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS

The plan for the random selection of grand and petit jurors adopted by this court in 1968 is hereby amended in the following particulars:

1. *Emptying and Refilling Master Jury Wheel:*

The last sentence of Section IV(B) on page 45a relating to emptying and refilling of the Master Jury Wheel is stricken and the following is substituted therefor:

> Each Master Jury Wheel shall be emptied and refilled between June 1, 1972 and December 22, 1972, and every four years thereafter between June 1 and December 22.

2. *Periodic Reports:*

The reporting provision appearing as the last sentence of Section IV(E) on page 46a commencing "In order to assure the continuous implementation . . ." is stricken and the following is substituted therefor:

> As required by the Judicial Conference of the United States, a report will be made to the Ad-

ministrative Office of the United States Courts on September 1, 1971, and thereafter within six months after each periodic refilling of the master jury wheel, on forms approved by the Judicial Conference, giving general date relating to the master jury wheel, the time and manner of name selection, the source and number of names placed in the wheel and related information, an analysis of the race and sex of the prospective jurors based on returns from 500 juror qualifications forms drawn at random from the master jury wheel, and an analysis by race, sex and occupation of all persons who have actually reported for jury service during the period covered by the report.

3. *Procedure in Excusing and Assigning Persons to Grand and/or Petit Jury Panels:*

The last paragraph of Section VI on page 50a is stricken and the following is substituted therefor:

> The Court may, in its discretion, excuse persons summoned for jury service upon a showing of undue hardship, extreme inconvenience or other ground of exclusion as set forth in Section 1866(c) of the Act, for such period of time as the Court may deem necessary and proper.
>
> The names of those jurors who have been excused from a petit or grand jury panel who have been excused from either panel for



> hardship or extreme inconvenience reasons will be put back in the qualified jury wheel where they will be subject to subsequent random selection, unless the Court granting the excuse should otherwise rule at the time of the excuse.
>
> Where there is an excess of jurors present (e.g. grand jury) and their presence is required for only one day, the Court shall, in its discretion, upon excusing the excess jurors, inform them that their names will be placed back in the qualified jury wheel subject to subsequent random selection.

4. *Qualified Jury Wheel:*

The last sentence of Section IX shall be stricken and the following is substituted therefor:

> The Qualified Jury Wheel shall be emptied and refilled initially, pursuant to the procedure herein prescribed, after the Master Jury Wheel has been emptied and refilled but not later than December 22, 1972, and thereafter between June 1 and December 22 of every fourth year.

---

SECOND AMENDMENT TO PLAN

OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS.

For the purpose of complying with Public Law 92-269 adopted April 6, 1972, the plan for the random selection of grand and petit jurors adopted by this Court in 1968 and amended in 1971, is hereby amended in the following particulars:

1. The last sentence of Section IV(B) relating to emptying and refilling the master jury wheel is stricken and the following is substituted therefor:

> Each master jury wheel shall be emptied and refilled between March 1, 1973, and September 1, 1973, and every four (4) years thereafter between March 1 and September 1.

2. The last sentence of Section IX relating to the qualified jury wheel is stricken and the following substituted therefor:

> The qualified jury wheel shall be emptied and refilled pursuant to the procedure prescribed after the master jury wheel has been emptied and refilled, but not later than October 1, 1973, and thereafter between March 1 and October 1 of every fourth (4th year).

3. Paragraph b(1) of Section VIII relating to determination of qualifications, excuses and examinations, is amended by striking out the words "21 years" and inserting in lieu thereof, "18 years."

4. As provided in the *Act of Congress, supra*, nothing in these amendments shall affect the composition of any master jury wheel or qualified jury



wheel prior to the date on which it is first refilled in compliance with the plan as amended and nothing herein shall affect the composition or preclude the service of any jury empaneled on or before the date on which the qualified jury wheel from which the jurors names and drawer is refilled in compliance with the provisions of the plan as amended.

---

## THIRD AMENDMENT TO PLAN

## OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS

No. 73-20-Misc.-J

For the purpose of clarifying (not altering) the language of the Plan for the Random Selection of Grand and Petit Jurors adopted by this Court in 1968 and amended in 1971 and 1972, said plan is hereby amended in the following particulars:

1. The sentence in paragraph VII(4) reading "All persons over 70 years of age at the time of executing the jury qualification form." is deleted in its entirety from said paragraph VII.

2. Paragraph VI is amended by adding thereto an additional sentence as follows:

> "(5) All persons over 70 years of age at the time of executing the jury qualification form."

Supreme Court, U. S.
FILED
JUL 15 1976
MICHAEL RODAK, JR., CLERK

No. 75-1487

# In the Supreme Court of the United States

OCTOBER TERM, 1976

---

DANIEL J. EVANS, WILLIAM K. BECK AND GEORGE W. MACFADDEN, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ROBERT H. BORK,
*Solicitor General,*

RICHARD L. THORNBURGH,
*Assistant Attorney General,*

JEROME M. FEIT,
IVAN MICHAEL SCHAEFFER,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1976

---

No. 75-1487

DANIEL J. EVANS, WILLIAM K. BECK AND
GEORGE W. MACFADDEN, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 2a-16a) is reported at 526 F. 2d 701. The order of the district court (Pet. App. 19a-21a) is not reported.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 18a) was entered on February 2, 1976, and a petition for rehearing with suggestion for rehearing *en banc* (Pet. App. 16a-17a) was denied on March 15, 1976. The petition for a writ of certiorari was filed on April 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether the procedures utilized in selecting the grand and petit juries—under which the deputy clerks,

subject to the supervision of and after consultation with the chief judge of the district in difficult instances, determined the qualifications of and excused from service persons whose names were to be placed in the qualified jury wheel—complied with the Jury Selection and Service Act.

## STATUTE INVOLVED

28 U.S.C. 1867(a) provides in pertinent part:

> In criminal cases, * * * the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

## STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on three counts of offenses involving the manufacture, use and possession of explosives and bombs, in violation of 18 U.S.C. 371 and 26 U.S.C. 5861(d) and (f), and were sentenced to imprisonment for from two to ten years. The court of appeals affirmed (Pet. App. 2a-16a).

The evidence showed that petitioner Beck, then the business manager of a local of the Plumbers and Pipefitters Union, was the principal figure in a four-year conspiracy, in which the other petitioners participated, to promote the union's interests through the use of explosive and incendiary bombs, which the conspirators manufactured. The conspirators planned and executed several bombings in connection with union disputes with non-union employers (Tr. 31, 32, 36-37, 971, 975, 986-987, 993), and blew up the hall of the carpenter's union in retaliation for its failure to honor a picket line (Tr. 49, 51, 53-55,



78, 93, 997). Petitioners Beck and MacFadden assisted in the manufacture of bombs used in the conspiracy (Tr. 111, 119-120, 259, 262).

Prior to trial, petitioners moved to dismiss the indictment on the ground that the procedures used to select the grand jury that had indicted them violated the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, and the district court's Plan implementing the Act. Their principal claim was that under the Act and the Plan, the selection of potential jurors for the qualified jury wheel had been improper because it was made by deputy clerks instead of by the district judge. After an evidentiary hearing, the district court denied the motion, holding that the evidence did not establish a substantial failure to comply with either the Act or the Plan (Pet. App. 21a).

The court of appeals affirmed (Pet. App. 3a-12a). It concluded that although there had been "technical deviations" from the requirements of the Act and the Plan in the jury selection process, those minor departures did not constitute a "substantial failure to comply" with the requirements, which under the statute (28 U.S.C. 1867 (a)) is the sole basis for dismissing an indictment or staying the proceedings (Pet. App. 4a, 12a).

## ARGUMENT

Petitioners seek reversal of their convictions on the ground that the selection of the panel from which the jurors were drawn violated the Jury Selection and Service Act (and the district court's Plan implementing that Act) because the deputy clerks rather than the chief judge of the district determined the qualifications and the exemptions from service of the persons to be placed on the panels from which the jurors were selected. Although the Act provides various procedures for the selection of and standards for the qualifications of jurors, violations of

those requirements is cause for dismissal of an indictment or reversal of a conviction only if there has been a "substantial failure to comply" with the statutory requirements. The court of appeals, in an opinion upon which we primarily rely, held that although there had been "technical deviations both from the Act and Plan," those departures did not constitute a "substantial failure to comply" with the statute (Pet. App. 4a). That ruling turns upon the facts of this particular case, is correct, and presents no issue warranting further review.

28 U.S.C. 1863(b)(1) provides that the juror selection plan may, as the Plan here in question provided, authorize "the clerk of the court * * * to manage the jury selection process * * * under the supervision and control of the chief judge * * *." See H.R. Rep. No. 1076, 90th Cong., 2d Sess. (1968); Pet. App. 44a. The day-to-day operation of the juror selection system under the Act is a "largely mechanical process" (H.R. Rep. No. 1076, *supra*, at 15), in which the court clerks routinely discharge ministerial responsibilities delegated to them under Section 1863, subject to judicial supervision. S. Rep. No. 891, 90th Cong., 1st Sess. 10 (1967).

This statutory scheme was followed in the present case. Although in most instances the deputy clerks applied the criteria prescribed in the Plan (Pet. App. 5a, nn. 4, 5, 6) —a Plan which the district court had formulated to implement the Act—in close cases they conferred with the chief judge of the district, who stated (C.A. App. 39, 40) that he "confer[red] frequently with each of [the] clerks in conferences in chambers concerning requests to be excused and the grounds therefor," and that, while he "was not aware of each and every excuse granted, [he] was aware" of the manner in which the clerks were performing their duties. This delegation of authority to the clerks was authorized by the district court Plan, which



provides (Pet. App. 44a) that the "clerk * * * is authorized to manage the jury selection process, acting under the supervision and control of the Chief Judge of this court."

In applying the guidelines prescribed in the Act and the Plan, the deputy clerks disqualified or excused 1,878 potential jurors out of 7,318 that had completed questionnaires (Pet. App. 6a).[1] Petitioners apparently suggest that the Act requires the district judge personally to pass upon the qualifications and excuses from jury service of all potential jurors. In view of the large number of such persons—7,318 in the present case—that would be an impossible task. The proper reading of the statute, we submit, is that the district judge has supervisory responsibility to insure that the grand and petit jury panels are chosen in compliance with the Act and the district court Plan.[2] That was the case here. As the court of appeals pointed out (Pet. App. 12a):

> In the case now before us there has been no showing of a thwarting of the Act's goals. The overwhelming majority of the errors alleged to have been committed by clerks in the screening process appear to have resulted not in the discriminatory exclusion

---

[1]Where one deputy clerk determined that a potential juror should have been excused, that decision was reviewed by a second deputy clerk (R. 951).

[2]Petitioners also complain about some errors made by the clerks in applying the guidelines in the Act and Plan. For example, working mothers with young children were not automatically excused, nor always were the sick or those who had served on juries in the past two years (Pet. App. 8a and nn. 9, 10, 11, 9a and n. 12). Also, apparently some persons who did not return questionnaires were not summoned to court, as they should have been (Pet. 4). However, as the court of appeals held (Pet. App. 12a), most of the errors were those of overinclusion, and the few examples of mistaken exclusion would not afford a basis for dismissal of the indictment.

from jury service against which the Act was intended to safeguard, but rather in the *inclusion* of persons who perhaps should have been relieved of jury duty. There may have been isolated examples of mistaken exclusion, but these alone do not afford a valid basis for challenging the grand jury [footnote omitted]. * * *.

In sum, no person or group was excluded from jury service on the basis of race, color, religion, sex, national origin, or economic status. No person was shown to have been rejected because of any extra-statutory, subjective criteria. The improprieties in the selection process did not operate to frustrate the goals of the Act. While we in no way mean to imply that the role of the judiciary should be lightly regarded, we conclude that these deviations in the selection process do not constitute a substantial failure to comply with the Act or the Plan.[3]

Petitioners contend (Pet. 7-8) that in holding that the "technical deviations" from the Act did not constitute a "substantial failure to comply" with it, the court of appeals acted inconsistently with the principles of *United States* v. *Giordano*, 416 U.S. 505. In *Giordano* the Court held that where authorizations for electronic surveillance had not been authorized by the Attorney General or an Assistant Attorney General, as required by the Omnibus Crime Control and Safe Streets Act of 1968, the evidence obtained through such invalid interceptions had

[3] *United States* v. *Zirpolo*, 450 F. 2d 424 (C.A. 3), on which petitioners rely (Pet. 11), is distinguishable. The procedures employed in that case resulted in twice as many males as females being on the grand jury panel a result that frustrated the statutory goal of obtaining jury panels which are a representative cross-section of the community.



to be suppressed. The rationale of the decision was that in requiring such authorization of interceptions Congress intended "to centralize and limit this authority" to those officials (416 U.S. 523).

The Jury Selection and Service Act, however, contemplates that the court clerks will play a major role in the jury selection process, and reflects no congressional intention to require the district judge personally to pass upon the qualification of thousands of potential jurors. Moreover, in this Act Congress expressly provided that not every violation would be grounds for dismissing an indictment or reversing a conviction, but only those which amount to a "substantial failure to comply" with the statutory requirements. There was no comparable provision in the statute involved in *Giordano*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

RICHARD L. THORNBURGH,
*Assistant Attorney General.*

JEROME M. FEIT,
IVAN MICHAEL SCHAEFFER,
*Attorneys.*

JULY 1976.

DOJ-1976-07